(2)

89-1998

Supreme Court, U.S.
FILED
JUN 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

THE SUPREME COURT OF

THE UNITED STATES

1990 TERM

STUART A LARSEN

PETITIONER,

V.

DEPARTMENT OF THE NAVY

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

JOINT APPENDIX

JAMES JAY SELTZER, COUNSEL OF RECORD

2200 Powell Street, Tenth Floor

Emeryville, CA 94608

(415) 596-2500

BEST AVAILABLE COPY

APPENDIX:

Judgement, 89-3379, U.S. Court of Appeals	A
Order, Docket SFO 7528910179 U.S. M.S.P.B. 6/29/89	B
Notice of Decision of Removal 7/9/83	C
Request for Appeal Hearing	D
Request Granted to Withdraw Appeal	E
Clarifying Order of November 2, 1984 by Judge Mangan and the Board	F
Formal Request to Local Board to Reopen Case	G
Appeal Dismissed as Untimely by Regional Board	H
Request Review of Initial Decision with National MSPB	I
Agency's Dismissal of Appellant's Appeal	J
Board Denies Initial Decision Review	K

Note: This judgment is not accompanied by an opinion prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

89-3379

STUART A. LARSEN,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

JUDGMENT

ON APPEAL FROM THE MERIT SYSTEMS PROTECTION BOARD

IN CASE NO(S). SF07528910179

This cause having been considered, it is

ORDERED AND ADJUDGED: Per Curiam (NIES, Circuit Judge, MILLER, Senior Circuit Judge, and LIFLAND,* Judge):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED: Mar 8, 1990

Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: March 29, 1990

Judge John C. Lifland of the United States District Court of New Jersey, sitting by designation.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

STUART A. LARSEN, DOCKET NUMBER

Appellant, SF0007528910179

v.

DEPARTMENT OF THE NAVY, Date:Jun 29, 1989

Agency.

_____/

James Jay Seltzer, Esquire, Emeryville, California, for the appellant.

Brad Garvais, Oakland, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman

Maria L. Johnson, Vice Chairman

Samuel W. Bogley, Member

ORDER

The Board finds that the appellant's petition for review of the initial decision issued on March 9, 1989, was timely filed. After full consideration,

however, the Board DENIES the appellant's petition because it does not meet the criteria for review set forth at 5 C.F.R. Section 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. Section 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. Section 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. Section 7703(b)(1).

FOR THE BOARD: _____
Robert E. Taylor

Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today: By certified mail to:

James Jay Seltzer, Esquire
Watergate Towers, 10th Floor
2200 Powell Street
Emeryville, CA 94608

By regular mail to:

Stuart A. Larsen
4831 Proctor Road
Castro Valley, CA 94608

Brad Garvais
Military Sealift Command, Pacific
Naval Supply Center, Building 310-5
Oakland, CA 94625

Timothy M. Dirks
Office of Personnel Management
Employee Relations Division
1900 E. Street, N.W., Room 7623
Washington, DC 20415

Merit Systems Protection Board
San Francisco Regional Office

525 Market Street, Suite 2800

San Francisco CA 94105-2789

By hand to:

Office of the Special Counsel

Merit Systems Protection Board

1120 Vermont Avenue, N.W.

Washington, DC 20419

Jun 29, 1989 _____

(Date) Robert E. Taylor

Clerk of the Board

Washington, D.C.

MILITARY SEALIFT COMMAND, PACIFIC

Oakland, California 94625

Refer to:

12296

Ser P-23/1722

2 September 1983

From: Commander, Military Sealift Command, Pacific

To: Mr. Stuart A. Larsen, 4831 Proctor Road, Castro Valley, California 94546

Subj: Removal; notice of decision

Ref: (a) Notice of Proposed Removal dated 19 July 1983

Encl: (1) SF-50 Notification of Personnel Action

(2) MSPB Appeal Form and Procedures

1. Reference (a) proposed that you be removed from your position as Financial Manager, GM-505-14, Deputy Comptroller, with Military Sealift Command, Pacific (MSCPAC) for the

following charges:

a. Falsification of official records.

b. Conflict of interests.

c. Fraudulent conduct.

2. I have carefully reviewed the charges and specifications contained in reference (a), and your reply of 12 August 1983 submitted by counsel. I note certain factual inaccuracies in the letter, such as:

a. The repeated contention that you revealed the transfer to your son of your interests in Integrated Systems Ideas, Inc. (ISI). I find no verification of this. One would suppose that the most obvious means of such revelation would have been via your memorandum of 10 December 1980, which announced your divestiture of interests in ISI, yet that memorandum did not identify the

transferee. In any event, the gravamen of the alleged offense does not concern your sons' connection with ISI, but your own continued affiliation with the firm.

b. The statement that you had "absolutely nothing" to do with the execution of the agreement between MSCPAC and the National Park Service. Personal inquiry convinces me that this statement is false, and its emphasis renders such falsehood the more blatant.

More importantly, I am convinced affiliation with ISI after December 1980 by probative evidence of record

12296

Ser P-2/1722

2 September 1983

Subj: Removal; notice of decision

to which I attribute more weight than to the exculpatory contentions in your 12 August letter. For example, I believe that the documents printed from MSCPAC

computer identified as files and "Stu/Lib." represented computer space controlled by you; and that these documents go far to establish that you were affiliated with ISI as late as May 1983 and give rise to a presumption of such affiliation until the audit date of 8 July 1983. Further, all of the above strongly indicate the use of MSCPAC computer equipment for purposes of ISI and yourself. In my assessment I am not unmindful that the matter identified as "Stu/Lib." was expunged from MSCPAC computer files shortly after the 8 July audit. I therefore find that the charges and specifications contained in reference (a) are fully supported by the evidence.

3. It is my decision that you be removed effective 9 September 1983. Enclosure (1) is your Notification of Personnel Action, SF-50.

4. I have concluded that your removal is appropriate in all the circumstances of this case and will promote the efficiency of the service. In reaching this conclusion I have considered many factors, the most compelling of which are the following:

a. Severity of the offenses. Conduct of government personnel has properly come under close scrutiny in recent years, with universal understanding and acceptance that nothing less than ethical purity will suffice. That concept has been reflected in SECNAVINST 5370.2G since its promulgation in 1977. Your offenses fly squarely in the face of that concept.

b. The relationship of the offenses to your position of trust and responsibility. You have been a senior manager throughout your MSCPAC employment, with broad responsibility for

financial management of an enterprise expending government funds of several hundred million dollars per year. Your functions have included decisions, advice and recommendations concerning MSCPAC procurement of ADP equipment and services with total cost of the multi-million dollar range. The office (Comptroller) in which you have served is the major user of ADP equipment and services. Your offenses are so closely related to the ADP functional area as to give rise to an impression of impropriety in the entire ADP procurement process, whether or not such impropriety exists.

c. The fact that your offenses continued over an extended period of time and despite specific and repeated advice concerning prohibition of such practices.

d. The effect of the offenses on your ability to be an effective supervisor and to command the trust and respect of your subordinates.

e. The level of your position and its prominence within the command.

f. Your duties as a command representative dealing with commercial firms and other agencies.

g. The consistency of the penalty with the applicable agency table of penalties.

h. My conclusion that there is no alternative penalty available which is appropriate for the offenses.

5. I have also given deep and lengthy consideration to your record of excellent federal service. My regretful conclusion, however, is that the above negative factors greatly outweigh all

positive considerations.

6. You may appeal this action to the Merit Systems Protection Board, 525 Market Street, San Francisco, California 94105, within 20 calendar days following the effective date of this action. Enclosure (2) pertains.

J.D. CAMP

Copy to: (w/o encls.)
Edwin C. Shiver, Esquire

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SAN FRANCISCO REGIONAL OFFICE

STUART A. LARSEN, DOCKET NO. 7528311054

Appellant,

vs.

DEPARTMENT OF THE NAVY,

Respondent.

_____/

REQUEST OF APPELLANT FOR POSTPONEMENT

OF DATE OF HEARING OF APPEAL

In accordance with 5 C.F.R. Section 1201.55(c), appellant Stuart A. Larsen requests that the Presiding Official postpone the hearing of this appeal from its present date of December 20, 1983, too January 24, 1984.

The relevant chronology of this appeal is as follows:

a. Appeal filed: 9/28/83

b. Board order on appeal

received by appellant: 10/5/83

c. Agency's response to appeal received by appellant: 10/24/83

d. Appellant's initial discovery (interrogatories and requests for document production) to agency: 10/26/83

e. Agency letter first refusal to comply with any discovery, received by appellant: 11/10/83

f. Appellant's required motion to compel agency's compliance with initial discovery requests: 11/14/83

g. Agency's opposition to motion of appellant to compel initial discovery: 11/18/83

h. Board order directing agency to comply with appellant's initial discovery: 11/23/83

i. Notice of Hearing received by appellant: 12/1/83

j. Appellant's request for issuance of hearing subpoenas: 12/6/83

k. Agency's responses to appellant's initial interrogatories and document requests, received by appellant: 12/9/83

l. Hearing subpoenas issued by Presiding Official, received by appellant: 12/13/83

Appellant's designated representative was involved in the preparation for the initial beginning of a jury trial in San Mateo County Superior Court in Borgfeldt v. Dellamanna, No. 70418, from late November until Monday, December 12 (when the case settled on the first day for trial). He was thus otherwise necessarily engaged when the Notice of Hearing and the agency's discovery

responses were received.

On or about December 8, the agency's designated representative advised that the agency's records subject to appellant's initial discovery request were available at the agency for inspection/copying, except for the N.I.S. reports: the representative advised that a "release" from the N.I.S. was being sought but had not then been obtained from N.I.S. to make such reports "available."

From the initial discovery finally accorded, it is now obvious that the substantial majority of the agency's alleged factual "case" against appellant is contained in the N.I.S. reports.1/ Thus, appellant was not prepared to inspect the agency records offered until the N.I.S. reports were available. The reports when available would in turn

materially bear upon which agency records would be possibly relevant as hearing exhibits, or as leads for additional relevant information. In addition, appellant's representative was involved in the jury trial identified above when the other records (less N.I.S. reports) were initially offered.

Not having heard from the agency representative that N.I.S. release clearance had been obtained, appellant's representative found out by telephone call on December 13 that the N.I.S. reports were available, and the document inspection was conducted that day.

Since that time, the agency has advised that one of appellant's witnesses, CDR Valenty, is unavailable for the December 20 hearing. Previously the agency had advised that the

---

1/ The N.I.S. reports themselves are a

compendium of heresay statements by purported agency or other "witnesses," including many of those persons listed by the agency as its potential hearing witnesses. Thus, while the N.I.S. reports themselves would not be properly admissible as "evidence" on this appeal, they do provide critical discovery leads to appellant.

witness would be available until December 23, when a duty assignment transfer was scheduled.

Under the foregoing compressed time schedule, the appeal hearing has been scheduled in less than 80 days after the receipt of the Board's initial order (October 5), some 40 days less than the "120 day" standard mentioned as Board practice in the initial order. In addition, through the agency's summary refusal to effect any discovery,

requiring appellant to consume time to move to compel that discovery, by the presently-scheduled hearing date appellant has effective been denied his right to follow-up discovery obviously anticipated in these proceedings under 5 C.F.R. Section 1201.73(d)(2).

The N.I.S. reports reflect an initial and continuing effort by the agency to interest the U.S. Attorney's office and the F.B.I. in a criminal investigation/criminal prosecution of appellant. Thus, appellant's Fifth Amendment privilege rights remain implicated. Accordingly, his preparation for the appeal hearing necessarily is thereby complicated, requiring additional investigatory time <u>following</u> the final receipt (December 9 and 13) of what now in fact appears to be the substance of the agency's alleged "case" supporting its termination of his 20 years of

honorable federal employment.

Accordingly, appellant cannot be properly prepared for a hearing on his appeal by December 20. To require him to proceed to the determinative administrative hearing on his federal employment rights under the time constraints outlined above would deny him his rights of procedural due process. Accordingly, appellant respectfully requests the postponement of the hearing from December 20, 1983, to January 24, 1984.

DATED: December 16, 1983.

Edwin C. Shiver
Designated Representative
for Appellant

AFFIDAVIT

State of California)
) ss.
City and County of San Francisco)

Edwin C. Shiver, being duly sworn,

deposes and says:

I am an attorney licensed to practice before the U.S. District Court for the Northern District of California, the Ninth Circuit Court of Appeals, and all Courts of the State of California, and the designated representative for the appellant in this appeal.

The factual recitals set forth in the preceding Request are true of my own knowledge. Because of the particular aspects of this appeal, including the repeated threats revealed in the agency's finally-obtained discovery responses to criminal prosecution of appellant -- regardless of any relative degree of risk of such actually occurring -- appellant's presentation of his defense to the termination action and alleged reasons therefore, and presentation of the acts of discrimination relating to advance travel payments identified in his appeal,

cannot properly be prepared by the present hearing date of December 20, 1983. Appellant requires additional time, particularly given the intervening holiday season, to complete his preparation for the hearing.

Edwin C. Shiver

Subscribed to and sworn to before me, the undersigned Notary Public, this 16th day of December, 1983.

Notary Public

My commission expires:

CERTIFICATE OF SERVICE

I certify that on December 16, 1983, I arranged to have a copy of the foregoing document (Request and Affidavit) delivered in person to the designated representative of the respondent named below, at the address listed below.

Carol H. Pickard, Esq.
Military Sealift Command, Pacific
(Code P-7)
Building 310, Navy Supply Center
Oakland, California 94625

Dated: December 16, 1983.

Edwin C. Shiver

SHIVER & STADUM

Attorneys at Law

Suite 1100

505 Sansome Street

San Francisco, California 94111

TELEPHONE

(415) 956-2400

December 16, 1983

Mr. Thomas J. Mangan
Presiding Official
U.S. Merit Systems Protection
Board
San Francisco Regional Office
525 Market Street
San Francisco, California 94105

Re: Larsen vs. Department of the Navy

Docket No. 7258311054

Dear Mr. Mangan:

Handed to you herewith as the appeal hearing Presiding Official in this matter is appellant's Request for Continuance of

the Hearing on Appeal under 5 C.F.R. Section 1201.55(c), which is apparently out of time by one (1) day under the local rule of your Board set forth in the initial appeal order. Accordingly, for purposes of this Request, appellant respectfully requests that you as Presiding Official waive the local rule requirement for purposes of considering the Request on its merits.

Additionally, by this letter, acting as the designated representative of the appellant and on his behalf, I request that you as the Presiding Official, or the Board itself at your request if such is required, accord to appellant testimonial immunity for purposes of the hearing -- if such is within the power of the Board. As pointed out in the enclosed Request and in other portions of the present appeal, appellant has been

and apparently still is threatened with a criminal investigation or possible attempted criminal prosecution by federal law enforcement agencies. It has come to our attention that the F.B. I. has served at least one subpoena duces tecum on an Oakland bank during November, apparently in connection with what may be an (off again, on again) criminal investigation of the nature mentioned several times in the N.I.S. reports finally produced by the agency in late discovery in this appeal.

If a grant of testimonial immunity to the appellant must be sought by more formal process, or to a different tribunal than the Board, please so advise. Obviously undertaking that process will require more time than is now available before the presently scheduled hearing. I emphasize that the dimensions of this need for immunity have

only now become apparent with the revelation of the N.I.S. reports on Wednesday of this week.

Thank you for your consideration of these requests.

Very truly yours,

Edwin C. Shiver

ECS/msm

cc: Carol H. Pickard,
Attorney at Law

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SAN FRANCISCO REGIONAL OFFICE

STUART A. LARSEN

v.

DEPARTMENT OF THE NAVY

DECISION NO.

SF07528311054

DATED: December 23, 1983

INTRODUCTION

By petition filed on September 29, 1983, the appellant, Stuart A. Larsen, appealed the action of the Department of the Navy, Military Sealift Command, Oakland, California, which removed him from the position of Financial Manager, GS-14, effective September 9, 1983.

The appellant was an employee as defined in 5 U.S.C. Section 7511(a)(1)(A). The Board has jurisdiction to adjudicate this appeal under the provisions of 5 U.S.C. Sections 7513(d) and 7701.

The appellant requested a hearing in connection with his appeal to the Board. The hearing was scheduled to be held on December 20, 1983, at San Francisco, California.

On December 16, 1983, the appellant's attorney, Edwi ı C. Shiver, filed a motion for postponement of the scheduled hearing because he had discovered that the Department of Justice was still investigating the appellant for possible criminal prosecution. He argued that to go forward with the appeal hearing before the Board would implicate his Fifth Amendment rights and would deny him his right of procedural due process.

On December 19, 1983, the agency's attorney, Carol H. Pickard, telephonically reported that the Department of Justice still had the appellant's case under advisement; however, it did not contemplate making

any determination on this matter for at least 60 days. Under these circumstances, the agency offered no objection to the appellant's motion to withdraw his appeal without prejudice.

Accordingly, the appellant's request to withdraw his petition of appeal to the Board without prejudice, to be refiled at a later date is he so desires, is granted. However, the appellant is directed to notify the Board at least every 60 days from receipt of this decision as to the status of any pending criminal prosecution and when he will be able to proceed with his appeal to the Board. The appellant must refile his petition of appeal to the Board within 20 calendar days from the date of resolution of any criminal prosecution on this matter. 5 C.F.R. Section 1201.41(b)(7). Toma v. Department of Labor, 5 MSPB 420

(1981).

DECISION

The appeal is DISMISSED without prejudice.

FOR THE BOARD: Thomas J. Mangan
Presiding Official

CERTIFICATE OF SERVICE

I certify that on the below listed date I sent by regular mail franked, prepaid postage, a copy of the Decision in this case addressed to the following:

Stuart A. Larsen
4831 Proctor Road
Castro Valley, CA 94546

Edwin C. Shiver
Shiver and Stadum
505 Sansome Street, Suite 1100
San Francisco, CA 94111

Carol H. Pickard
Military Sealift Command
Pacific, Bldg. 310, Code P-7
Oakland, CA 94625

Office of the Chief of
Naval Operations
U.S. Dept. of the Navy
Washington, D.C. 20350

Date: December 23, 1983

Carol Freeland

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SAN FRANCISCO REGIONAL OFFICE

STUART A. LARSEN DECISION NO:

V. SF07528311054

DEPARTMENT OF THE NAVY

DATE:NOVEMBER 2, 1984

ORDER

This is in further reference to the above-captioned decision which dismissed the appellant's petition of appeal, without prejudice, on December 23, 1983.

By letter dated September 28, 1984, the agency requested the Board to direct the appellant to make a determination on whether he wishes to refile a petition of appeal with the Board from the removal action. The appellant was removed from his position effective September 9, 1983. His request to withdraw the initial petition of appeal, filed on

September 29, 1983, was granted. The request was based upon possible criminal prosecution of the appellant by the Department of Justice based upon the same charges which led to his removal.

The agency's representative stated that she had received information that the office of the United States Attorney had declined prosecution in July 1984. She argued that the appellant's alleged lack of diligence amounted to failure to prosecute.

The appellant's attorney responded by letters dated October 1st and 15th, 1984. He maintained that he was unaware that the United States Attorney had declined criminal prosecution and that he had received no such notification from either that office or the agency. Upon inquiry, he was informed by Robert Dondero, Assistant United States

Attorney, that prosecution had been "declined" at this time; however, the investigation could and would be reopened should "significant new evidence" come to his attention. The appellant's representative maintained that the time was not yet ripe for filing an appeal with the Board because the question of possible criminal prosecution has not been finally resolved.

In order to resolve this issue, the agency's representative is directed to make a formal inquiry with the United States Attorney to determine if that office has declined criminal prosecution of the appellant based upon the same charges for which he was removed from his position. If criminal prosecution has been declined, then the agency will officially notify the Board and the appellant. The appellant will have 20 days from the date of the agency's

official notification to file a timely appeal with the Board from the September 9, 1983 removal action.

The Board has adopted the principle set forth by the court in Polcover v. Department of the Treasury, 477 F.2nd 1223, (D.C. Cir. 1955). The court addressed the issue and held that due process is not observed if an accused person is subjected without his consent, to an administrative hearing on a serious criminal charge that is pending against him. (underscoring furnished). See Morgan v. United States Postal Service 10 MSPB 578 (1982). 5 CRF 1201.41 (b).

FOR THE BOARD:

THOMAS J. MANGAN

PRESIDING OFFICIAL

STUART A. LARSEN

V. DECISION NO.:

DEPARTMENT OF THE NAVY SFO7528311054

DATE: NOVEMBER 2, 1984

CERTIFICATE OF SERVICE

I certify that on the below listed date I sent by regular mail franked, prepaid postage, a copy of the Order in this case addressed to the following:

Stuart A. Larsen
4831 Proctor Road
Castro Valley, CA 94546
(Appellant)

Edwin C. Shiver
Shiver and Stadum
505 Sansome Street, Suite 1100
San Francisco, CA 94111
(Appellant's Representative)

Carol H. Pickard
Military Sealift Command

Pacific Bldg., 310, Code P-7

Oakland, CA 94625

(Agency)

Office of the Chief of

Naval Operations

U.S. Department of the Navy

Washington, D.C. 20350

DATE: NOVEMBER 2, 1984

Kathleen Fernandes

LAW OFFICES OF

JAMES JAY SELTZER

Watergate Towers, Tenth Floor

2200 Powell Street

Emeryville, California 94608

Telecopier (415) 596-2519

Telephone (415) 596-2500

November 4, 1988

Thomas Mangan, Presiding Official
Merit Systems Protection Board
525 Market Street, Room 2800
San Francisco, CA 94105

Dear Mr. Mangan:

I wish to formally request the reopening of my appeal, Larsen v. Department of the Navy, MSPB Appeal Docket No. SF07528311054. My rights against possible self-incrimination remained implicated so long as the U.S. Attorney could, with prosecutorial discretion, prosecute under Title 18 U.S.

Code Section 201 with a statute of limitations of five years as established by Title 18 U.S. Code Section 3181. With the tolling of the possible prosecution I feel able to successfully reopen my appeal, without compromise to the rights of the agency or myself.

Stuart A. Larsen

November 21, 1988

Received

Nov 29, 1988

Merit Systems Protection Board

San Francisco Regional Office

Received Nov 28, 1988

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SAN FRANCISCO REGIONAL OFFICE

STUART A. LARSEN, DOCKET NUMBER

Appellant, SF07528910179

v.

DATE: March 9, 1989

DEPARTMENT OF THE NAVY,

Agency.

_____/

James Jay Seltzer, Emeryville, California, for the appellant.

Brad Garvais, Oakland, California, for the agency.

BEFORE

Fenton H. Hughes

Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant was removed from his position of Financial Manager, effective September 9, 1983. The Board has appellate jurisdiction under 5 U.S.C.

Section 7511-13. His appeal was dismissed without prejudice, subject to certain conditions, on December 23, 1983, by Administrative Judge Thomas Mangan, who has since retired. The appellant re-filed his appeal on November 29, 1988.

For the reasons given below, the appeal is DISMISSED as untimely.

TIMELINESS

The original appeal was dismissed pending the resolution of a possible related federal criminal prosecution, and Judge Mangan issued the following instructions in his decision of dismissal.

"However, the appellant is directed to notify the Board at least every 60 days from receipt of this decision as to the status of any pending criminal prosecution and when he will be able to proceed with his appeal to the Board. The appellant must refile his petition of appeal to the Board within 20 calendar days from the date of resolution of any criminal prosecution on this matter."

The appellant did not contact the Board during the ensuing 9 months. During September and October 1984, there was an exchange of correspondence among Judge Mangan, Edwin Shiver, Esq., the

appellant's counsel, and Carol Pickard, Esq. the agency's counsel. Ms. Pickard complained that the appellant had not followed the 60-day schedule for notifying the Board of the status of the criminal prosecution, and Mr. Shiver took the position that no notification was necessary because nothing had happened.

On November 2, 1984, Judge Mangan directed Ms. Pickard to make a formal inquiry of the U.S. Attorney as to whether prosecution had been declined. If so, she was to officially notify the Board and Mr. Shiver, who would have 20 days in which to re-file the appeal. On November 15, Ms. Pickard submitted to Judge Mangan and Mr. Shiver a letter from Robert Dondero, the Assistant U.S. Attorney assigned to the case. Mr. Dondero stated, "this office declined prosecution of Mr. Larsen because of the

lack of evidence there was a violation of the federal criminal law in this situation." Earlier, on November 2, Ms. Pickard had submitted documents from both the Naval Investigative Service and the Federal Bureau of Investigation, to the effect that their investigations were closed.

On January 2, 1985, Ms.Pickard informed Mr. Shiver that a new appeal had not been received by the Board, even though more than 20 days had passed since she had formally notified him of the U.S. Attorney's decision to decline prosecution. She stated that she would assume that no appeal would be re-filed unless she heard from him within 10 days.

On January 11, Mr. Shiver responded, stating that he did not intend to re-file the appeal, since in his view the U.S. Attorney retained the right to initiate prosecution until the statute of

limitations expired. That is, he did not regard Mr. Donder's statement as sufficient, since he had not guaranteed that there would be no future prosecution. Mr. Shiver also requested Judge Mangan to advise him as to whether the Board "considers that letter (from Mr. Dondero) to satisfy its condition for a present decision by the appellant to re-file his appeal. If we are so advised that it <u>does</u>, then the appellant will make a prompt decision whether to re-file his appeal, or abandon it."

Judge Mangan retired at about this time, and the Board made no response to Mr. Shiver's request. The record contains no further correspondence from either party or the Board. Three years and 10 months later, represented by new counsel, the appellant re-filed the present appeal.

The agency has moved to dismiss the appeal as untimely. It argues that it would be severely prejudiced by litigation at this late date, inasmuch as the principal agency participants in the case have retired or transferred. The appellant points out that the statute of limitations for the possible criminal prosecution, which involved an allegation of larceny in the amount of approximately $2,500, is 5 years from the date of commission of the alleged offense. See 18 U.S.C. Section 3282. He argues that he was in jeopardy of criminal prosecution for that period of time, and was entitled to have the Board's administrative proceeding postponed until the statute of limitations had expired.

The appellant's alleged offense was discovered on July 9, 1983. His re-filing on November 29, 1988, was therefore untimely by 4 months, even if

one were to assume that he was not required to re-file until 20 calendar days (the normal Board filing deadline) after the statute of limitations had expired.

The Board recognizes that an employee should not be required to defend himself in its administrative proceedings if by so doing he would jeopardize his rights in a related criminal proceeding. It has applied this principle in cases where an indictment or criminal complaint has not yet been handed down. However, absent these, it has required that an "ongoing criminal investigation" be in progress. Green v. United States Postal Service, 16 M.S.P.R. 203, 206 (1983). In the case here, as noted, prosecution had been declined and the investigation had been closed. There is no authority to support the appellant's argument that he

is entitled to a postponement of Board proceedings until the statute of limitations expires.

Finally, the basic issue in determining timeliness is whether the employee has exercised "due diligence" in protecting his rights. Casey v. Merit Systems Protection Board, 748 F.2d 685, 686 (Fed. Cir. 1984). Here, Judge Mangan's decision made clear that he expected the appellant to keep the board apprised of his situation (regardless of whether the 60-day notification schedule was still in effect). On January 2, 1985, Ms. Pickard informed Mr. Shiver that she would assume that he did not intend to re-file the appeal unless she heard from him in 10 days. On January 11, Mr. Shiver asked Judge Mangan for advice. The Board erred by not responding. However, 3 years and 10 months then passed. I do not find that

the appellant exercised due diligence in doing nothing for this lengthy period.

In summary, the appellant is untimely by 4 months even by his own argument, he had no entitlement to a postponement of Board proceedings after the criminal investigation was closed and prosecution was declined, and he has not exercised due diligence. In addition, the agency has shown that it would be severely prejudiced by litigation at this late date. Accordingly, the appeal is dismissed as untimely.

DECISION

The petition is of appeal is DISMISSED as untimely.

FOR THE BOARD: Fenton H. Hughes

Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on April 13,1989, unless a petition for review is filed by that date or the Board reopens that case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the

proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand-delivered no later than the date of this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be

rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant

Stuart A. Larsen

4831 Proctor Road

Castro Valley, CA 94546

Appellant's Representative

James Jay Seltzer, Esquire

Watergate Towers, 10th Fl.

2200 Powell STreet

Emeryville, CA 94608

Agency Representative

Brad Garvais

Military Sealift Command, Pacific

Naval Supply Center, Bldg. 310-5

Oakland, CA 94625

Other

Timothy M. Dirks

U.S. Office of Personnel Management

Employee Relations Division

1900 "E" Street, NW., Room 7623

Washington, D.C. 20415

Date: March 9, 1989

Fenton H. Hughes

Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant

Stuart A. Larsen

4831 Proctor Road

Castro Valley, CA 94546

Appellant's Representative

James J. Seltzer, Esquire

Watergate Towers, 10th Floor

2200 Powell Street

Emeryville, CA 94608

Agency Representative

Brad Garvais

Military Sealift Command, Pacific

Naval Supply Center, Building 310-5

Oakland, CA 94625

Other

Timothy M. Dirks

Office of Personnel Management

Employee Relations Division

1900 "E" Street, N.W., Room 7623

Washington, DC 20415

Date: March 9, 1989

Sue Huerta

Legal Clerk

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SAN FRANCISCO REGIONAL OFFICE

_____)

Stuart A. Larsen DOCKET NUMBER

SF 0752810179

Appellant,

v. REFILING JUSTIFICATION

DEPARTMENT OF THE NAVY

Agency

_____)

PREVIOUS APPEAL HISTORY

By petition filed on September 29, 1983, the appellant, Stuart A. Larsen, moved for appeal of the action of the Department of the Navy, Military Sealift Command, Oakland, California, which removed him from the position of Financial Manager, GM-14, effective September 9, 1983.

The appellant was an employee as defined in 5 U.S.C. Section

7511(a)(1)(A).

The appellant requested a hearing in connection with his appeal to the Board. The hearing was scheduled to be held on December 20, 1983, at San Francisco, California.

On discovery that possible criminal prosecution was being contemplated in connection with the same matter, Appellant requested leave to withdraw his appeal petition without prejudice. The board granted appellant's request on December 23, 1983.

A subsequent clarifying order was issued on November 2, 1984 by Judge Mangan and the Board, directing that appellant will have 20 days from the date of declination of prosecution to file a timely appeal with the Board.

PROSECUTION STANDING

The possible prosecution of appellant under the allegations of the

Federal Bureau of Investigation and Naval Investigative Service reports was for violations of Title 18 United States Code Section 201. The statute of limitations which applies to the cited alleged conduct is found at Title 18 United States Code Section 3282 as five years after such offense shall have been committed.

Since at the time of the original filing the office of the United States Attorney could not definitely agree to a declination of prosecution, the danger to appellant of prosecution existed for five years. Accordingly after five years appellant has filed for a reopening of his appeal.

PREJUDICE TO CRIMINAL PROCEEDINGS

The board has agreed that due process is violated if an accused person is subjected, without his consent, to an

administrative hearing concerning conduct also subject to a serious criminal charge that is pending against him. MARTIN v. U.S. Customs Service, ATO 75209044 (1982).

Requiring the appellant to defend a case administratively while an investigation by the U.S. Attorney is pending would cause him to risk self incrimination, if he testified or if the presiding official could draw an adverse inference if he did not; results that could constitute improper interference with the criminal investigation. Green v. U.S. Postal Service, PHO 7528310352 (1983).

DELAY AS A REASONABLE OPTION

The Board has been shown to have the power to act with discretion in granting lengthy delays in appeal filings where the employee's fear of prosecution is well founded. CEJA v. United States, 710

F.2d 812 (Fed. Cir. 1983).

The Appellant has acted reasonably, and prudently, the circumstances of the statute were beyond control of the Appellant and he did not act in a neglectful manner, the criteria for reopening is observance of such reasonable and prudent standards of action. ALONZO v. Dept. of the Air Force, 14 MSPB 262 (1980).

We cannot ascertain any prejudicial effect to the agency or the Board emanating from the delay in refiling. On the contrary, prejudice could only have accrued to the Appellant had appeal reopened at an earlier date. We respectfully request expeditious reopening of this appeal.

_____

FOR THE APPELLANT

JAMES JAY SELTZER

APPELLANT'S REPRESENTATIVE

DECLARATION OF MAILING

I, the undersigned, am a citizen of the United States, over the age of eighteen (18), and not a party to the within cause or proceeding; I am employed by the Law Offices of JAMES JAY SELTZER and my business address is 2200 Powell Street, Suite 1000, Emeryville, California 94608; I served the attached:

REFILING JUSTIFICATION

by placing a true copy in an envelope addressed as follows:

Appellant
Stuart A. Larsen
4831 Proctor Rd.
Castro Valley, CA 94546

United States Merit Systems
Protection Board
Regional Office
525 Market St., Room 2800
San Francisco, Ca 94105
Agency Representative

Commander

Military Sealift Command, Pacific

Naval Supply Center

Oakland, CA 94625-5010

which envelope was than sealed and postage fully prepaid thereon, and, on the date set forth below, deposited in the United States mail at Emeryville, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 10, 1989 at Emeryville, California.

Lynne Otis, Law Offices of

JAMES JAY SELTZER

JAMES JAY SELTZER, ESQ.
LAW OFFICES OF JAMES JAY SELTZER
2200 Powell Street, suite 1000
Emeryville, California 94608
(415) 596-2500
Attorney for Appellant

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

STUART A. LARSEN,)

Appellant,

v.

DOCKET NO. SF07528910179

DEPARTMENT OF THE NAVY, REQUEST FOR

Agency REVIEW OF

_____)

INITIAL DECISION

PREVIOUS APPEAL HISTORY

By petition filed on September 19, 1983, the Appellant, Stuart A. Larsen, moved for appeal of the action of the Department of the Navy, Military Sealift Command, Oakland, California, which removed him from the position of

Financial Manager, GM-14, effective September 9, 1983.

The Appellant was an employee as defined in 5 U.S.C. Section 7511(a)(1)(A).

The Appellant requested a hearing in connection with his appeal to the Board. The hearing was scheduled to be held on December 20, 1983, at San Francisco, California.

On discovery that possible criminal prosecution was being contemplated in connection with the same matter, Appellant requested leave to withdraw his appeal petition without prejudice. The Board granted Appellant's request on December 23, 1983.

The Appellant subsequently requested reopening of his appeal on November 29, 1988. This period of five years having passed because Appellant was in danger of prosecution under Title 18 United States

Code Section 201, with the statute of limitations as established found at Title 18 United States Code Section 3282 as five years after commission of such an alleged offense.

The initial decision on the issue of reopening was made on March 9, 1989 by Judge Hughes at the San Francisco Regional Office. Judge Hughes dismissed the appeal as untimely.

Appellant now requests review of that decision.

THE ISSUE OF TIMELINESS

The original appeal was dismissed pending the resolution of a possible related federal criminal prosecution. Judge Mangan, the presiding judge at that time, issued an instruction that Appellant Larsen was to notify the Board every 60 days as to the status of any pending prosecution. Prosecution status

did not change. On November 2, 1984, Judge Mangan directed the Agency Counsel, Ms. Pickard, to make a formal inquiry of the U.S. Attorney as to whether prosecution had been declined.

On November 15, 1984, Ms. Pickard submitted a letter to the Board from Mr. Dondero, Assistant U.S. Attorney, stating that prosecution was not pending at that time. But Mr. Dondero was not able to promise that charges would not be pressed if testimony in an administrative forum proved evidence for a criminal investigation. Thus any foreclosing of prosecution of Appellant was temporary, and could only be safely prevented by expiration of the Statute of Limitations. Indeed Appellant's counsel at that time, Mr. Shiver, was able to receive verbal assurances from the U.S. Attorney that additional evidence could well trigger criminal prosecution.

Mr. Shiver, Appellant counsel, did request that Judge Mangan inform Appellant as to the Board's interpretation of Mr. Dondero's letter. But Judge Mangan retired, the Regional Board remained moot on the issue of the U.S. Attorney's letter and time passed. Since the Board remained moot, Appellant did not report on intended prosecution at 60 day intervals. It is not the custom of U.S. Attorneys to comment on prosecutions at semi-monthly intervals or to guarantee non-prosecution before the statute expires on a given offense. The position of the U.S. Attorney is one which requires an openness to <u>any</u> potential for prosecution as long as standards for evidence can be met. Judge Mangan's silence concerning the 60 day reporting requirement convinced Appellant that such reports were no longer an

issue.

If, indeed, the Board erred in its nonresponse to the Appellant then so did the Agency in failing to clarify its interests. The Appellant understood the insufficiency of the U.S. Attorney's response, therefore, there seems no need to clarify Judge Mangan's actions.

Contrary to the Agency's representations, the Appellant was not enjoying idleness but was living with the constant threat of prosecution.

AN ACTIVE APPEAL

DOES NOT PREJUDICE THE AGENCY

We do not concur with the contentions of the Agency that its interests are prejudiced by a reopened appeal. Most of the witnesses and data to be utilized at an administrative hearing are available, including: (1) The charging officer Commander Romansky; (2) Appellant's supervisor, Captain McCauley;

(3) The Accounting officer, Ms. Torok; (4) Ms. Leal, a key witness for both parties; (5) Ms. Thomas, a key witness for both parties; and (6) Mr. Devenuda a key supervisor.

The Agency contends that the records concerning this matter are in permanent storage. However, the Agency used the same records very recently in another matter, concerning a contract protest for the Military Sealift Command Hospital Ships A-76 Protest Hearing Brief, filed with the General Accounting Office (G.A.O.) by Mr. Hamner, Agency Counsel. It seems reasonable to assume that if records are available for counsel to utilize in a G.A.O. brief they are available to use in an M.S.P.B. hearing.

THE DELAY WAS INNOCENT AND NON-PREJUDICIAL

The initial decision by Judge Hughes

references the refiling as occurring four months after the five year expiration. While that is true, it must be noted that four months is only six percent of the interval since discovery. We believe that this error is innocent in comparison to the possible public policy considerations evident in compromise of the Appellant Fifth Amendment privileges. As in Alonzo v. Dept of the Air Force, 4 M.S.P.B. 262 (1980), we believe that the employee's reasonable excuse for the delay should be accepted.

As long as a U.S. Attorney can hold open a criminal investigation file there is a potential for prosecution and the criteria for non-self-incrimination as in Green v. U.S. Postal Service, 16 M.S.P.R. 203 (1983) are met.

DUE DILIGENCE HAS BEEN UTILIZED

Judge Mangan was moot on the once enunciated 60 day rule at critical

junctures of this matter. The U.S. Attorney could not rule out prosecution. The statute to be prosecuted and the Statute of Limitations involved were known and understood by all parties. The Appellant chose to retain new counsel to reopen the appeal.

The requirement of due diligence of Casey v. Merit Systems Protection Board, 748 F.2d 685 (Fed. Cir. 1984) has been satisfied.

The Board has the authority to act with discretion in granting delays in appeal filings. CEJA v. U.S., 710 F. 2d 812 (Fed. Cir. 1983). With a strong public policy consideration in favor of the Fifth Amendment principle and the reasoned efforts of the Appellant in this case, we request consideration, particularly in the lack of prejudice to the Agency.

Prejudice could only have occurred to the Appellant had the appeal been reopened at an earlier date. We respectfully request review and direction to the Regional Office for Appellate Hearings.

_____

JAMES JAY SELTZER

Attorney for the Appellant

DECLARATION OF MAILING

I, the undersigned, am a citizen of the United States, over the age of eighteen (18), and not a party to the within cause or proceeding; I am employed by the Law Offices of JAMES JAY SELTZER and my business address is 2200 Powell Street, Suite 1000, Emeryville, California 94608; I served the attached:

PETITION FOR REVIEW

by placing a true copy in an envelope addressed as follows:

Stuart A. Larsen
4831 Proctor Road
Castro Valley, CA 94546

Brad Garvais
Military Sealift Command, Pacific
Naval Supply Center, Bldg. 310-5
Oakland, CA 94625

Judge Fenton H. Hughes
U.S. Merit Systems Protection Board
San Francisco Regional Office

525 Market St., Room 2800

San Francisco, CA

Timothy M. Dirks

U.S. Office of Personnel Management

Employee Relations Division

1900 "E" Street, N.W., room 7623

Washington, D.C. 20415

which envelope was then sealed and postage fully prepaid thereon, and, on the date set forth below, deposited in the United States mail at Emeryville, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 31, 1989, at Emeryville, California.

_____

LYNNE OTIS

Law Offices of JAMES JAY SELTZER

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SAN FRANCISCO REGIONAL OFFICE

STUART A. LARSEN, Appellant v. DEPARTMENT OF THE NAVY, Agency	DOCKET NUMBER SF07528910179 DATE: April 27, 1989

AGENCY'S MOTION TO DISMISS APPELLANT'S REQUEST FOR REVIEW AS UNTIMELY, AND IN THE ALTERNATIVE, AGENCY'S RESPONSE TO APPELLANT'S REQUEST FOR REVIEW OF INITIAL DECISION

Some preliminary facts regarding the dating of Appellant's Request for Review are warranted as an introduction to this response. The Agency received Appellant's Request for Review by certified mail on April 13, 1989. The

envelope containing Appellant's request is postmarked April 11, 1989 (attachment 1). Appellant's Certificate of Service certifies that the Request for Review was served...by placing a true copy in an envelope, addressed to the Agency and others, which envelope was then sealed and postage fully prepaid thereon, and, on the date set forth below, deposited in the United States mail at Emeryville, California. The date set forth below is March 31, 1989. To say the least, it is improbable that the Request for Review was placed in the U.S. Mail on March 31, 1989.

1. Motion to Dismiss Request for Review as Untimely

Judge Hughes' Initial Decision (Attachment 2) became final on April 12, 1989. The decision clearly identified the forum and address to which a review should be submitted. Despite such clear

guidance, the Appellant submitted his request to the wrong forum, on some unknown date. (The Agency has no confidence in Appellant's Certificate of Service.) On April 17, 1989, the San Francisco Regional Office, which had erroneously received the Request for Review, referred the request to the proper forum, the full Board in Washington, D.C. (Attachment 3). That referral document states "Office of the Clerk of the Board, MSPB Was not Served." Accordingly, the Agency maintains Judge Hughes' Initial Decision has become final by its own terms on April 13, 1989. Furthermore, Preliminary to the Board entertaining Appellant's Request for Review, the Appellant should be called upon to show just cause for his untimely filing of the request. If no just cause for the untimeliness is shown, the Agency

respectfully requests Appellant's Request for Review be dismissed.

2. Response

The Agency hereby appears and asserts its support of Judge Fenton H. Hughes' Initial Decision (Attachment 2) which dismissed Appellant's appeal as untimely. The Agency continues to maintain Appellant' s appeal is untimely for the reasons set forth in its Motion to Dismiss Appeal as Untimely (Attachment 4) originally filed with Judge Hughes on January 12, 1989.

Wherefore the Agency prays the full Board affirm Judge Hughes' Initial Decision based upon the sound reasoning found therein and the supporting legal argument within Attachment 4.

Respectfully submitted,

BRAD GARVAIS

Assistant Counsel for the Agency

CERTIFICATE OF SERVICE

I certify that the attached documents were sent by regular mail today to:

Stuart A. Larsen
4831 Proctor Road
Castro Valley, CA 94546

James J. Seltzer, Esq.
Watergate Towers, 10th Floor
2200 Powell Street
Emeryville, CA 94608

Judge Fenton H. Hughes
U.S. Merit Systems Protection Board
525 Market Street, Rm 2800
San Francisco, CA 94105

and by certified mail to:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W. Suite 802
Washington, D.C. 20419

Date: April 28, 1989

BRAD GARVAIS

Agency Representative

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SAN FRANCISCO REGIONAL OFFICE

STUART A. LARSEN,	DOCKET NUMBER
Appellant,	SF07528910179
v.	
DEPARTMENT OF THE NAVY,	DATE: March 9,
Agency.	1989

James J. Seltzer, Esquire, Emeryville, California, for the appellant.

Brad Garvais, Oakland, California, for the agency.

BEFORE

Fenton H. Hughes

Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant was removed from his position of Financial Manager, effective

September 9, 1983. The Board has appellate jurisdiction under 5 U.S.C. Section 7511-13. His appeal was dismissed without prejudice, subject to certain conditions, on December 23, 1983, by Administrative Judge Thomas Mangan, who has since retired. The appellant re-filed his appeal on November 29, 1988.

For the reasons given below, the appeal is DISMISSED as untimely.

TIMELINESS

The original appeal was dismissed pending the resolution of a possible related federal criminal prosecution, and Judge Mangan issued the following instructions in his decision of dismissal.

However, the appellant is directed to notify the Board at least every 60 days from receipt of this decision as to the status of any pending criminal prosecution and when he will be able to

proceed with his appeal to the Board.

The appellant must refile his petition of appeal to the Board within 20 calendar days from the date of resolution of any criminal prosecution on this matter.

The appellant did not contact the Board during the ensuing 9 months. During September and October 1984, there was an exchange of correspondence among Judge Mangan, Edwin Shiver, Esq., the appellant's counsel, and Carol Pickard, Esq., the agency's counsel. Ms. Pickard complained that the appellant had not followed the 60-day schedule for notifying the Board of the status of the criminal prosecution, and Mr. Shiver took the position that no notification was necessary because nothing had happened.

On November 2, 1984, Judge Mangan directed Ms. Pickard to make a formal inquiry of the U.S. Attorney as to whether prosecution had been declined. If so, she was to officially notify the Board and Mr. Shriver, who would have 20 days in which to re-file the appeal. On November 15, Ms. Pickard submitted to Judge Mangan and Mr. Shiver a letter from Robert Dondero, the Assistant U.S. Attorney assigned to the case. Mr. Dondero stated, "this office declined prosecution of Mr. Larsen because of the lack of evidence there was a violation of the federal criminal law in this situation." Earlier, on November 2, Ms. Pickard had submitted documents from both the Navel Investigative Service and the Federal Bureau of Investigation, to the effect that their investigations were closed.

On January 2, 1985, Ms. Pickard

informed Mr. Shiver that a new appeal had not been received by the Board, even though more than 20 days had passed since she had formally notified him of the U.S. Attorney's decision to decline prosecution. She stated that she would assume that no appeal would be re-filed unless she heard from him within 10 days.

On January 11, Mr. Shiver responded, stating that he did not intend to re-file the appeal, since in his view the U.S. Attorney retained the right to initiate prosecution until the statute of limitations expired. That is, he did not regard Mr. Dondero's statement as sufficient, since he had not guaranteed that there would be no future prosecution. Mr. Shiver also requested Judge Mangan to advise him as to whether the Board "considers that letter (from Mr. Dondero) to satisfy its condition for

a present decision by the appellant to re-file his appeal. If we are so advised that it does, then the appellant will make a prompt decision whether to re-file his appeal, or abandon it."

Judge Mangan retired at about this time, and the Board made no response to Mr. Shiver's request. The record contains no further correspondence from either party or the Board. Three years and 10 months later, represented by new counsel, the appellant re-filed the present appeal.

The agency has moved to dismiss the appeal as untimely. It argues that it would be severely prejudiced by litigation at this late date, inasmuch as the principal agency participants in the case have retired or transferred. The appellant points out that the statute of limitations for the possible criminal prosecution, which involved an allegation

of larceny in the amount of approximately $2,500, is 5 years from the date of commission of the alleged offense. See 18 U.S.C. Section 3282. He argues that he was in jeopardy of criminal prosecution for that period of time, and was entitled to have the Board's administrative proceeding postponed until the statute of limitations had expired.

The appellant's alleged offense was discovered on July 9, 1983. His re-filing on November 29, 1988, was therefore untimely by 4 months, even if one were to assume that he was not required to re-file until 20 calendar days (the normal Board filing deadline) after the statute of limitations had expired.

The Board recognizes that an employee should not be required to defend himself in its administrative proceedings

if by so doing he would jeopardize his rights in a related criminal proceeding. It has applied this principle in cases where an indictment or criminal complaint has not yet been handed down. However, absent these, it has required that an "ongoing criminal investigation" be in progress. Green v. United States Postal Service, 16 M.S.P.R. 203, 206 (1983). In the case here, as noted, prosecution had been declined and the investigation had been closed. There is no authority to support the appellant's argument that he is entitled to a postponement of Board proceedings until the statute of limitations expires.

Finally, the basic issue in determining timeliness is whether the employee has exercised "due diligence" in protecting his rights. Casey v. Merit Systems Protection Board, 748 F.2d 685, 686 (Fed. Cir. 1984). Here, Judge

Mangan's decision made clear that he expected the appellant to keep the Board apprised of his situation (regardless of whether the 60-day notification schedule was still in effect). On January 2, 1985, Ms. Pickard informed Mr. Shiver that she would assume that he did not intend to re-file the appeal unless she heard from him in 10 days. On January 11, Mr. Shiver asked Judge Mangan for advice. The Board erred by not responding. However, 3 years and 10 months then passed. I do not find that the appellant exercised due diligence in doing nothing for this lengthy period.

In summary, the appellant is untimely by 4 months even by his own argument, he had no entitlement to a postponement of Board proceedings after the criminal investigation was closed and prosecution was declined, and he has not

exercised due diligence. In addition, the agency has shown that it would be severely prejudiced by litigation at this late date. Accordingly, the appeal is dismissed as untimely.

DECISION

The petition of appeal is DISMISSED as untimely.

FOR THE BOARD

_____

Fenton H. Hughes

Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on April 13, 1989, unless a petition for review is filed by that date or the Board re-opens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions

are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. you must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or

hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant

Stuart A. Larsen

4831 Proctor Road

Castro Valley, CA 94546

Appellant's Representative

James J. Seltzer, Esquire

Watergate Towers, 10th Fl.

2200 Powell Street

Emeryville, CA 94608

Agency Representative

Brad Garvais

Military Sealift Command, Pacific

Naval Supply Center, Bldg. 310-5

Oakland, CA 94625

Other

Timothy M. Dirks

U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7623
Washington, D.C. 20415

Date: March 9, 1989

Fenton H. Hughes
Administrative Judge

U.S. MERIT SYSTEMS PROTECTION BOARD

SAN FRANCISCO REGIONAL OFFICE

JAMES JAY SELTZER, ESQ.

LAW OFFICES OF JAMES JAY SELTZER

2200 Powell Street, Suite 1000

Emeryville, CA 94608

Date: April 17, 1989

File DM:lah

REFERRAL

SUBJECT: Larsen, Stuart v. DEPARTMENT OF THE NAVY

SF07528910179

The item identified in the subject has been sent to the office shown below because it appears to be a matter for their consideration. Please direct any further correspondence about the matter to the address below:

Additional remarks:

Appellant's Request For Review of Initial Decision

Office of the Clerk of the Board, MSPB Was not Served.

cc: Stuart A. Larsen
4831 Proctor Road
Castro Valley, CA
94546
Brad Garvais
Military Sealift
Command, Pacific
Naval Supply Center,
Bldg. 310-5
Oakland, CA 94625
FORWARDED FOR ACTION TO:
OFFICE OF THE CLERK OF THE BOARD MERIT SYSTEMS PROTECTION BOARD 1120 Vermont Avenue, North West Room 802 Washington, DC 20419

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

STUART A. LARSEN,

Appellant,

Docket Number

SF07528910179

v.

DEPARTMENT OF THE NAVY

Agency.

Date: June 29, 1989

James J. Seltzer, Esquire, Emeryville, California, for the appellant.

Brad Garvais, Oakland, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman

Maria L. Johnson, Vice Chairman

Samuel W. Bogley, Member

ORDER

The Board finds that the appellant's petition for review of the initial decision issued on March 9, 1989, was timely filed. After full consideration, however, the Board DENIES the appellant's petition because it does not meet the criteria for review set forth at 5 C.F.R. Section 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. Section 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. Section 7703(a)(1). you must submit your request to the court at the following address:

United States Court of Appeals

for the Federal Circuit

717 Madison Place, N.W.

Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. Section 7703(b)(1).

FOR THE BOARD:

_____

Robert E. Taylor

Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

James J. Seltzer, Esquire
Watergate Towers, 10th Floor
2200 Powell Street
Emeryville, CA 94608

By regular mail to:

Stuart A. Larsen
4831 Proctor Road
Castro Valley, CA 94608

Brad Garvais
Military Sealift Command,
Pacific
Naval Supply Center,
Building 310-5
Oakland, CA 94625

Timothy M. Dirks
Office of Personnel
Management
Employee Relations Division
1900 E Street, N.W., Room

7623

Washington, DC 20415

Merit Systems Protection Board

San Francisco Regional Office

525 Market Street, Suite 2800

San Francisco, CA 94105-2789

By hand to:

Office of the Special Counsel

Merit Systems Protection Board

1120 Vermont Avenue, N.W.

Washington, DC 20419

June 29, 1989

(Date)

Robert E. Taylor

Clerk of the Board

Washington, D.C.

JAMES JAY SELTZER
LAW OFFICES OF JAMES JAY SELTZER
2200 Powell Street, Suite 1000
Emeryville, California 94608
(415) 596-2500
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Stuart A. Larsen,
Appellant,

v.

Department of the Navy,
Agency

UNITED STATES MERIT SYSTEMS PROTECTION BOARD DOCKET NO. SF07528910179

PETITION FOR REVIEW

The Appellant, STUART A. LARSEN, petitions the Court for judicial review of the Merit Systems Protection Board's final decision dated June 29,1989. Said Order is attached to Petition for Review.

JAMES JAY SELTZER, ESQ.

Attorney for Appellant

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

STUART A. LARSEN,

Appellant,

v.

DEPARTMENT OF THE NAVY,

Agency.

DOCKET NUMBER

SF07528910179

Date: June 29, 1989

James J. Seltzer, Esquire, Emeryville, California, for the appellant.

Brad Garvais, Oakland, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman

Maria L. Johnson, Vice Chairman

Samuel W. Bogley, Member

ORDER

The Board finds that the appellant's petition for review of the initial decision issued on March 9, 1989, was timely filed. After full consideration,

however, the Board DENIES the appellant's petition because it does not meet the criteria for review set forth at 5 C.F.R. Section 1201. 115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. Section 1201.113.(b).

PROOF OF SERVICE

I certify that this PETITION FOR REVIEW was sent today, by Certified Mail, Return Receipt Requested, to:

The Clerk of the Court
The United States court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

AND

Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

AND

Brad Garavis, Esq.
Counsel
Military Sealift Command, Pacific
Naval Supply Center, Building 310-5

Oakland, CA 94625

By regular mail to:

Stuart A. Larsen

4831 Proctor Road

Castro Valley, CA 94546

AND

Timothy M. Dirks

Office of Personnel Management

Employee Relations Division

1900 E Street, N.W., Room 7623

Washington, D.C. 20415

AND

Merit Systems Protection Board

San Francisco Regional Office

525 Market Street, Suite 2800

San Francisco, CA 94105-2789